



DEPARTMENT OF AGRICULTURE

Rural Utilities Service

7 CFR Part 1700

RIN 0572-AC23

Substantially Underserved Trust Areas (SUTA)

AGENCY: Rural Utilities Service, USDA.

ACTION: Final rule.

SUMMARY: The Rural Utilities Service (RUS) is issuing regulations related to loans and grants to finance the construction, acquisition, or improvement of infrastructure projects in Substantially Underserved Trust Areas (SUTA). The intent is to implement Section 306F of the Rural Electrification Act by providing the process by which eligible applicants may apply for funding by the agency.

DATES: Effective: [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Michele Brooks, Director, Program Development and Regulatory Analysis, Rural Utilities Service, Rural Development, U.S. Department of Agriculture, 1400 Independence Avenue, SW., STOP 1522, Room 5162-S, Washington, DC 20250-1522. Telephone number: (202) 690-1078, Facsimile: (202) 720-8435.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This rule has been determined to be not significant for purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Rural Development has determined that this rule meets the applicable standards provided in section 3 of that Executive Order. In addition, all State and local laws and regulations that are in conflict with this rule will be preempted. No retroactive effect will be given to the rule and, in accordance with section 212(e) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. 6912(e)), administrative appeal procedures must be exhausted before an action against the Department or its agencies may be initiated.

Regulatory Flexibility Act Certification

RUS has determined that this rule will not have a significant economic impact on a substantial number of small entities, as defined in the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). RUS provides loans to borrowers at interest rates and on terms that are more favorable than those generally available from the private sector. RUS borrowers, as a result of obtaining federal financing, receive economic benefits that exceed any direct economic costs associated with complying with RUS regulations and requirements.

Information Collection and Recordkeeping Requirements

The information collection and recordkeeping requirements contained in this rule are pending approval by OMB and will be assigned OMB control number 0572-0147 in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35).

E-Government Act Compliance

Rural Development is committed to the E-Government Act, which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

Catalog of Federal Domestic Assistance

The programs described by this rule are listed in the Catalog of Federal Domestic Assistance Programs under number 10.759, Special Evaluation Assistance for Rural Communities and Households Program (SEARCH); 10.760, Water and Waste Disposal Systems for Rural Communities; 10.761, Technical Assistance and Training Grants; 10.762, Solid Waste

Management Grants; 10.763, Emergency Community Water Assistance Grants ; 10.770, Water and Waste Disposal Loans and Grants (Section 306C) ; 10.850; Rural Electrification Loans and Loan Guarantees; 10.851, Rural Telephone Loans and Loan Guarantees, 10.855, Distance Learning and Telemedicine Loans and Grants; 10.857, State Bulk Fuel Revolving Fund Grants, 10.859, Assistance to High Energy Cost Rural Communities; 10.861, Public Television Station Digital Transition Grant Program; 10.862, Household Water Well System Grant Program 10.863, Community Connect Grant Program; 10.864, Grant Program to Establish a Fund for Financing Water and Wastewater Projects; 10.886, Rural Broadband Access Loans and Loan Guarantees.

The Catalog is available on the Internet at <http://www.cfda.gov>.

Executive Order 12372

Most programs covered by this rulemaking are excluded from the scope of Executive Order 12372, Intergovernmental Consultation, which may require consultation with State and local officials. See the final rule related notice entitled “Department Programs and Activities Excluded from Executive Order 12372,” (50 FR 47034). However, the Water and Waste Disposal Loan Program, CFDA number 10.770, is subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

Unfunded Mandates

This rule contains no Federal mandates (under the regulatory provision of Title II of the Unfunded Mandate Reform Act of 1995) for State, local, and tribal governments or the private

sector. Thus, this rule is not subject to the requirements of sections 202 and 205 of the Unfunded Mandate Reform Act of 1995.

National Environmental Policy Act Certification

Rural Development has determined that this rule will not significantly affect the quality of the human environment as defined by the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.). Therefore, this action does not require an environmental impact statement or assessment.

Executive Order 13132, Federalism

The policies contained in this rule do not have any substantial direct effect on states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Nor does this rule impose substantial direct compliance costs on state and local governments. Therefore, consultation with the states is not required.

Executive Order 13175

The policies contained in this rule do not impose substantial unreimbursed direct compliance costs on Indian tribal, Alaska native, or native Hawaiian governments and sovereign institutions or have tribal implications that preempt tribal law. Prior to development of this rulemaking, the agency held Tribal Consultations at seven (7) USDA regional consultations, conducted sixteen (16) SUTA specific consultations and hosted three (3) internet and toll free teleconference based webinars in order to determine the impact of this rule on Tribal governments, communities, and individuals. Reports from these sessions for consultation will be made part of the USDA annual

reporting on Tribal Consultation and Collaboration, the annual SUTA Report to Congress and were used extensively throughout the drafting of this proposed rule.

Background

USDA Rural Development (Rural Development) is a mission area within the U.S. Department of Agriculture comprising the Rural Housing Service, Rural Business/Cooperative Service and Rural Utilities Service. Rural Development's mission is to increase economic opportunity and improve the quality of life for all rural Americans. Rural Development meets its mission by providing loans, loan guarantees, grants and technical assistance through more than forty programs aimed at creating and improving housing, businesses and infrastructure throughout rural America.

Rural Utilities Service (RUS) loan, loan guarantee and grant programs act as a catalyst for economic and community development. By financing improvements to rural electric, water and waste, and telecom and broadband infrastructure, RUS also plays a big role in improving other measures of quality of life in rural America, including public health and safety, environmental protection, conservation, and cultural and historic preservation.

The 2008 Farm Bill (P.L. 110-246, codified at 7 U.S.C. 936f) authorized the Substantially Underserved Trust Area (SUTA) initiative. The SUTA initiative gives the Secretary of Agriculture certain discretionary authorities relating to financial assistance terms and conditions that can enhance infrastructure financing options in areas that are underserved by electric, water and waste, and telecommunications and broadband utilities. Given the challenges, dynamics, and opportunities in implementing the SUTA initiative, RUS has aimed to foster a process that includes the voices of tribal leaders, tribal community members, Alaska Native Regional and

Village Corporations, Guam, American Samoa and the Commonwealth of the Northern Mariana Islands, and other stakeholders.

Preliminary research by RUS identified various reports that provided several insights. In 2007, the United States Census Bureau Facts for Features article (dated 10/29/07) reported that the poverty rate of people who reported being sole race American Indian and Alaska Native (AI/AN) was 27 percent. Additionally, in 2006, the United States Government Accountability Office reported that based on the 2000 decennial census, the telephone subscribership rate for Native American households on tribal lands was substantially below the national level of about 98 percent. Specifically, about 69 percent of Native American households on tribal lands in the lower 48 states and about 87 percent in Alaska Native villages had telephone service. Additionally, in 2000, the United States Census Bureau reported that on Native American lands, 11.7 percent of residents lack complete plumbing facilities, compared to 1.2 percent of the general U.S. population.

There are special considerations and challenges in implementing an initiative to communities residing on trust lands. Many American Indians, Alaska Natives, Native Hawaiians, and Pacific Islanders have a deep spiritual, cultural, and historical relationship with the land. In certain circumstances, the objectives of economic and infrastructure development can be at odds with spiritual, cultural, historical, and environmental values. Additionally, there are special legal considerations inherent in financing projects in areas where the land itself cannot be used as security.

The SUTA initiative identifies the need to improve utility service and seeks to improve the availability of RUS programs to reach communities within trust areas when communities are determined by the Secretary of Agriculture (such authority has been delegated to the

Administrator of RUS) to be substantially underserved. The RUS programs that are affected by this provision include: Rural Electrification Loans and Guaranteed Loans, and High Cost Energy Grants; Water and Waste Disposal Loans, Guaranteed Loans and Grants; Telecommunications Infrastructure Loans and Guaranteed Loans; Distance Learning and Telemedicine Loans and Grants; and Broadband Loans and Guaranteed Loans.

In addition to its discretionary authority to implement the SUTA provisions, RUS is under a continuing obligation to make annual reports to Congress on (a) the progress of the SUTA initiative, and (b) recommendations for any regulatory or legislative changes that would be appropriate to improve services to communities located in substantially underserved trust areas. RUS has submitted three reports to Congress, dated June 18, 2009, June 21, 2010, and August 23, 2011.

The USDA Office of Native American Programs (since renamed the Office of Tribal Relations, hereinafter OTR) and RUS began exploring SUTA initiative implementation in 2008 after passage of the Farm Bill. RUS in conjunction with OTR interpreted implementation to include formal USDA Tribal Consultations and working with stakeholders that are federally recognized tribes. Pursuant to this determination and in accordance with President Obama's November 5, 2009, Memorandum on Tribal Consultation, RUS conducted sixteen (16) direct tribal consultations, seven (7) regional consultations, one listening session and three (3) internet and toll free teleconference based webinars on implementation of the SUTA provision with Indian tribes from across the country. Additionally, the agency heard from six Federal agencies at three separate consultations on how best to implement the SUTA provision.

Federal agencies that were consulted include: the Department of the Interior, as the primary Federal agency with many direct responsibilities to Native American and Pacific Islander

stakeholders; the Department of Veterans Affairs, for its clarification of the definition of “trust land”; the Environmental Protection Agency, because it has information regarding underserved trust areas with environmental challenges; the Department of Energy, because it has an interest in promoting energy development and conservation in trust areas; the Department of Commerce and the Federal Communications Commission, because each agency has an interest in telecommunications service in trust areas; the Department of Health and Human Services, because it has a long standing interest in providing health care services and promoting the adoption of health IT in native communities; and the Office of Management and Budget.

As a result of categorizing and analyzing the comments received through tribal consultations and filed comments, RUS was able to identify certain issues that impact both the underserved communities that seek better access to RUS programs, and the federal agencies that have similar yet sometimes competing interests in trust areas. This regulation is informed by the insight gained through consultations and comments, and is designed to complement existing loan, grant, and combination loan and grant programs with the SUTA provisions that authorize the Administrator to apply certain discretionary authorities (2 percent interest and extended repayment terms; waivers of nonduplication restrictions, matching fund requirements, or credit support requirements; and highest funding priority) for the benefit of eligible communities, and the entities that serve them, in underserved Trust areas.

Discussion of Proposed Rule and Comments Received

In its Proposed Rule, published in the Federal Register October 14, 2011, (76 FR 63846), the agency requested comments regarding implementing the Substantially Underserved Trust Areas provision of the 2008 Farm Bill. The agency received nine comments from the following organization/individuals:

- Society of American Indian Government Employees
- Lalamilo Community Association
- NANA Regional Corporation
- Winnebago Tribe of Nebraska
- WAIMEA Hawaiian Homesteaders Assoc., Inc.
- State of Hawaii, Department of Hawaiian Home Lands
- Council for Native Hawaiian Advancement
- National Tribal Telecommunications Association
- Cheyenne River Sioux Tribe

These comments have been summarized and are addressed below:

Society of American Indian Government Employees

The Society expressed support and appreciation for the hard work performed by the RUS staff.

The Society recommended that the agency 1) affirmatively proclaim that all land (including all “fee land”) within tribal reservation boundaries to be qualified as trust lands for the SUTA provision, (2) designate the data requirements under § 1700.107 as burdensome and require that the burden of proof be on the current service providers to demonstrate that they are actually providing service at reasonable prices (3) refrain from requiring tribal communities to document significant health risks when a significant proportion of the community is unserved, and (4) ensure that RUS applicant reviewers have some tribal training on special legal status of tribes as sovereign nations before reviewing these types of applications. The Society also suggested that

the SUTA Farm Bill provisions ensure that tribes are automatically eligible to receive waivers from the agency's non duplication policies when a tribe applies to serve their own areas.

RUS Response:

With regard to trust land status, the RUS does not have the authority to adjust the statutory definition of trust lands. RUS understands the unique "checker board" character of trust and non-trust lands in tribal communities. The agency, consistent with its current practice, may consider SUTA related applications that include non-Trust territories when the service to or through those areas are "necessary and incidental" to improving service to a covered Trust area. In other cases, the agency could allocate SUTA benefits to SUTA eligible territories.

With regard to data requirements under §1700.107, the proposed rule provides that the "explanation and documentation of the high need for the benefits of the eligible program...may" include data from the list of proxies. As such the list is not exclusive and applicants are welcome to provide additional information which could demonstrate to the Administrator that the high need for the benefits of the eligible program exists. The agency understands the burden; however the applicant is in the best position to at least make an initial case that current services are inadequate. The agency can then attempt to document the service delivery by incumbent providers and the agency will make an independent determination based on the information that is available.

With regard to areas unserved by water utilities, the agency certainly supports the general proposition that the absence of clean sources of drinking water poses serious health risks, but the specific details of the types of health risks a community faces due to water quality and

availability in that specific location both helps the agency meet the finding of “substantially underserved” and target limited funding to areas where it is needed the most.

As for training on the special legal status of tribes as sovereign nations for application reviewers, the agency has and will continue to train staff on the SUTA provision and a wide range of issues affecting tribal participation in RUS program including the sovereign nation status of tribes.

RUS has provided service to numerous tribes as sovereign nations, and understands the legal status and collateral challenges to develop solutions that provide for program participation and the balance to protect taxpayer investments.

Regarding amendments to the Farm Bill, under SUTA the RUS may make legislative recommendations and will take our experience with the new authorities into account.

Waimea Hawaiian Homesteaders Association, Council for Native Hawaiian Advancement, Lalamilo Community Association and the Department of Hawaiian Homelands

The agency received comments from several entities in support of RUS’ historic consultation efforts to implement the SUTA provisions to communities residing on trust lands managed by the Department of Hawaiian Home lands. The agency has a long history of providing access to capital for infrastructure projects to communities throughout the Hawaiian home lands. The current statute only applies the SUTA provisions to RUS programs. The Rural Development mission area will likely learn from the implementation of SUTA by the RUS and may outline important best practices in its annual report to Congress.

In comments submitted by the state of Hawaii's Department of Hawaiian Homelands (DHHL), recommendations were made requesting the agency to 1) interpret § 1700.104 to apply feasibility requirements on the specific project rather than the applicant and 2) interpret §1700.107 to permit USDA to provide grant assistance of up to 75 percent for communities on Trust lands in Alaska and Hawaii that have a median family income of 80 percent.

RUS Response:

Regarding the feasibility recommendation, the agency points to its response to the NTTA (below) which raised similar recommendations. The RUS is bound under Section 306F(c)(4) of the Rural Electrification Act (RE Act) which states that the Secretary "shall only make loans or loan guarantees that are found to be financially feasible" under the SUTA amendments to the RE Act and it does not expand other discretions. The SUTA discretionary authorities defined by these provisions of the RE Act are summarized earlier. The RUS will continue its long standing practice of working collaboratively with native communities to find solutions that balance federal loan security requirements with the unique circumstances facing native communities. Therefore, DHHL's recommendations regarding loan security and financial feasibility will be addressed in the application review process.

With regard to DHHL's recommendation to authorize grant assistance of up to 75 percent for communities on Trust lands in Alaska and Hawaii with a median family income of 80 percent, the agency points to its response to NTTA regarding the level of grant funds dedicated for a particular provision in the statute. The amount of loan and grant funds that can be dedicated for

any single purpose are generally defined by the authorizing statutes the agency administers and the annual appropriations laws which allocate budget authority (BA) to various programs. The SUTA provisions of the RE Act do not grant the agency any new authorities to convert BA among and between grant, direct loan or loan guarantee categories. Where it has such authority, the agency takes into account the needs of eligible communities.

We also note DHHL's support for § 1700.108 which covers application requirements that invite SUTA applicants to provide a variety of data sets that are already provided to other federal agencies who work closely with native communities. With the inclusion of subsection (H), RUS recognizes the need for native communities to articulate their unique circumstances to federal agencies for purposes of program eligibility.

NANA Regional Corporation

The NANA Regional Corporation (an ANCSA Regional Corporation in Alaska) filed comments expressing concern over the current eligibility requirements contained in the Proposed Rule on SUTA. NANA argues that the current requirements may preclude villages in its region and across Alaska for SUTA consideration since many Alaska Native villages are not located on large tracts of trust land.

RUS response:

The definition of trust areas in the Proposed Rule is taken directly from the current statute (7 U.S.C. 306F (B)(2)) added to the RE Act as part of the Food, Conservation and Energy Act of 2008 (the Farm Bill). This definition includes land that “is owned by a Regional Corporation or a Village Corporation, as such terms are defined in Section 3(g) and 3(j) of the Alaska Native Claims Settlement Act...” The RUS does not have the authority to adjust the statutory definition of trust lands. RUS understands the many unique infrastructure challenges that rural communities (both Native and non-Native) face throughout Alaska. The agency, consistent with current practice, however, may consider SUTA related applications that include non-Trust territories when the service to or through those areas are “necessary and incidental” to improving service to a covered Trust area. In other cases, the agency could allocate SUTA benefits to SUTA eligible territories. RUS is also legislatively mandated to report to Congress annually on its implementation of the SUTA legislation. As part of that report, RUS may suggest “recommendations for any regulatory or legislative changes that would be appropriate to improve services to substantially underserved trust areas.” In this regard, the NANA suggestions on coverage of non-Trust territories are very helpful.

Winnebago Tribe of Nebraska

The Winnebago Tribe of Nebraska expressed support for the SUTA regulations championing waivers of matching requirements and giving the highest priority to SUTA projects to facilitate expedient construction, acquisition or improvements of infrastructure throughout tribal communities. The Tribe noted the ongoing need for access to robust broadband service to be deployed in order for economic capacity building to occur throughout the Winnebago community. Specifically, the Tribe highlighted the inadequate level of mobile wireless and broadband coverage in their region. The tribe’s listed priorities in health, education, safety and

economic capacity building and recommend that tribal governments merit the right to control the planning, adoption, utilization and sustainability of any and all services that advance their goals.

RUS Response

SUTA will give the RUS new tools to make financial resources more accessible to entities seeking to bring modern utility services to tribal areas. We share the concerns expressed by the Tribe that unserved native communities can no longer be ignored and that the availability of adequate broadband access remains an important national priority. USDA has made the deployment of advanced services on Tribal lands a central pillar to our rural economic development mission which will be accelerated by this regulation.

National Tribal Telecommunications Association

The National Tribal Telecommunications Association commended USDA for its diligence implementing the SUTA provisions and offered specific comment on the following topics:

Disparity Analysis

The National Tribal Telecommunications Association (NTTA) suggested that the USDA adopt a metric of “disparity” to assess infrastructure “underservice” and recommended a comparison of access to infrastructure in a Trust Area and an area of community immediately contiguous to the Trust Area.

RUS Response:

In §1700.108(i) of the proposed rule, the agency seeks data from the applicant documenting a lack of service or inadequate service in the affected community (§1700.108(i)). The relative level of service between Trust and non-Trust territories as well as the relative cost between those areas are relevant factors and could be provided by applicants in a SUTA request. A disparity analysis may be very helpful in demonstrating a lack of service. If disparity information is provided in a RUS application, the agency will take such information into consideration when reviewing SUTA requests. RUS believes that codifying a disparity test may have the unintended consequence of signaling that SUTA authorities would be less available where a Trust Area exists and its surrounding non-Trust areas all suffer from a lack of service.

Overlapping or Incumbent Service Provider Areas

The NTTA recommends that the proposed definition of “underserved” in section 1700.101 be amended to add the phrase, “notwithstanding that a service provider is an RUS borrower.”

RUS Response:

A change in the definition of “underserved” is not necessary to address the concern of the commenter and is addressed elsewhere. Whether an area is determined to be “underserved” does not depend on the relationship of the incumbent service provider to the RUS. However, among the discretionary powers given to the agency under section 306F(c)(2) of the RE Act and under

section 1700.106 of the proposed rule, is the power to waive “non-duplication restrictions.” That core discretionary authority is not limited to areas served by RUS borrowers or non-borrowers.

Financial Feasibility Considerations

NTTA makes several comments and recommended changes regarding financial feasibility, loan security and risk assessments as well as weighing financial feasibility against a community’s lack of essential infrastructure. Specifically, NTTA recommends changing proposed section 1700.104 from “the financial feasibility of an application will be determined pursuant to normal underwriting practices for a particular eligible program” to “pursuant to normal underwriting practices, and such reasonable alternative practices as may support financial feasibility determination for a particular eligible program.” NTTA also proposes to add additional discretionary authorities related to collateral, security and risk assessment and Times Interest Earned Ratio (TIER) calculations.

RUS Response:

The Section 306F(c)(4) of the Rural Electrification Act states that the Secretary “shall only make loans or loan guarantees that are found to be financially feasible” under the SUTA amendments to the Rural Electrification Act and it does not expand other discretions. The SUTA discretionary authorities defined by these provisions of the Rural Electrification Act are summarized here.

- **AUTHORITY OF SECRETARY.**—In carrying out subsection (b),

the Secretary—

- may make available from loan or loan guarantee programs administered by the Rural Utilities Service to qualified utilities or applicants financing with an interest rate as low as 2 percent, and with extended repayment terms;
- may waive nonduplication restrictions, matching fund requirements, or credit support requirements from any loan or grant program administered by the Rural Utilities Service to facilitate the construction, acquisition, or improvement of infrastructure;
- may give the highest funding priority to designated projects in substantially underserved trust areas; and
- shall only make loans or loan guarantees that are found to be financially feasible and that provide eligible program benefits to substantially underserved trust areas.

The proposed regulation faithfully codifies those authorities and the constraint of financial feasibility is also aligned with the RUS programs to assure debt repayment and protect taxpayer funds. The agency does not have the administrative ability to exceed that authority. However, the commenter's concerns about finding creative solutions to feasibility issues are well taken.

The RUS has a long history of working closely with tribal communities to address loan security issues. Since the earliest days of the Rural Electrification Administration and now the RUS, the agency has found ways to reconcile taxpayer's expectation of loan security with the sovereign rights of tribal governments. In this regard, the agency has adapted its mortgage documents and its loan contracts to accommodate unique tribal needs and circumstances.

The agency intends to continue to work with tribal organizations to find creative ways to address tribal needs while preserving loan security. Therefore, the final rule will adapt the language proposed by NTTA for §1700.104 to read, “pursuant to normal underwriting practices, and such reasonable alternatives within the discretion of RUS that contribute to a financial feasibility determination for a particular eligible program or project.”

Eligible Communities

NTTA proposes that consistent with its advocacy before the Federal Communications Commission (FCC), Tribes be given an option to choose the service provider serving a Trust community or providing services for its own community and that the Trust Area governments be permitted to engage service providers on quality of service standards.

RUS Response:

All RUS applicants are required to demonstrate in their application that they have secured all regulatory approvals necessary to construct infrastructure and deliver services. The RUS does not have the power to define the jurisdiction of tribal governments and is mindful of their sovereignty. The agency engages with tribes on a government to government basis. An applicant must demonstrate that they have secured all necessary regulatory approvals on the federal, tribal, state and local levels. Furthermore, applicants must demonstrate that their projects are financially feasible. The agency notes that an applicant seeking to finance

infrastructure on trust territory would likely have a difficult time demonstrating financial feasibility if it could not demonstrate tribal support, at a governmental or community level.

Grant Authority

The NTTA recommends that RUS convert loan funds to grant options for the benefit of “underserved” or “unserved” trust communities.

RUS Response:

The availability of loan and grant funds are generally defined by the authorizing statutes the agency administers and the annual appropriations laws which allocate budget authority (BA) to various programs. The SUTA provisions of the RE Act do not grant the agency any new authorities to convert BA among and between loan, grant or loan guarantee categories. Where it has such authority, the agency takes into account the needs of eligible communities.

Flexible Proxies for Infrastructure Underservice

The NTTA commends the RUS for providing a list of proxies for determining “underservice” and recommends that an additional provision be added to allow for additional data to be submitted.

RUS Response:

The proposed rule provides that the “explanation and documentation of the high need for the benefits of the eligible program...may” include data from the list of proxies. As such the list is not exclusive and applicants are welcome to provide additional information which could demonstrate to the Administrator that the high need for the benefits of the eligible program exists.

Technical Assistance

The NTTA recommends that RUS implement a technical assistance program.

On a related matter, the NTTA also recommends that the RUS recommend to entities seeking to serve Trust Areas that they apply under SUTA.

RUS Response:

“While the RUS has limited formal technical assistance funding for some of its programs,” the RUS is committed to expanding outreach to tribal communities and applicants on all of its programs. The RUS appreciates the suggestion and shares the commenter’s concern about technical assistance. That is why in the Broadband Initiatives Program of the American Recovery and Reinvestment Act of 2009, the RUS dedicated \$3,384,202 of budget authority to fund 19 technical assistance grants. The majority of those awards were to Native American communities and organizations.

USDA State Rural Development Offices, RUS General Field Representatives, Rural Water Circuit Riders and RUS headquarters staff all offer assistance to applicants and are integral parts of the rural development program delivery. SUTA is an important initiative and RUS and RD staff members have been trained on the provision and will be trained on the final rule.

Cheyenne River Sioux Tribe

In comments filed pursuant to the proposed SUTA regulation, the Cheyenne River Sioux Tribe requests that the RUS interpret the statutory language for SUTA to allow a waiver of the statutory limitation on provision of grant in 7 USC 1926(a)(2) for Water and Waste Disposal grants.

7 U.S.C. 1926(a)(2)(A)(ii) states that “the amount of any grant made under the authority of this subparagraph shall not exceed 75 per centum of the development cost of the project to serve the area which the association determines can be feasibly served by the facility and to adequately serve the reasonably foreseeable growth needs of the area.”

The commenter writes that the authority provided to the Secretary pursuant to Section 6105(C)(2) of the 2008 Farm Bill, allows the Secretary to waive the 75 percent grant limitation when considering financial assistance pursuant to 7 CFR 1780.

Neither authorizing statute for the Water and Waste Disposal loan and grant program, nor the program regulations, specifically state that a match is required. By way of contrast, in 7 USC 1926(a)(2)(C)(ii)(II), Congress specifically refers to matching funds related to Special Evaluation Assistance for Rural Communities and Households (SEARCH). In addition, in

Section 306C of the Consolidated Farm and Rural Development Act (ConAct), Congress specifically authorized the Secretary to provide up to 100 percent grants for water and waste infrastructure to Native American Tribes to address health and sanitary issues.

However, the commenter further suggests that “a restriction of the total amount of project cost that would be funded with grant funds creates a matching requirement whether the word “matching” is used.

RUS Response:

The Agency will consider requests for waiver of some, or all, of the loan portion of a loan-grant combination under SUTA authority on a case-by-case basis. The decision to consider a waiver does not waive the over-arching requirement for a finding of need or feasibility pursuant to program regulations. The final determination of grant assistance will be made based on the following factors:

1. Eligibility requirements, including credit elsewhere certifications pursuant to 1780.7 (d);
2. Underwriting and demonstration of need for grant, including the use of the prevailing program interest rate and the discretionary as low as 2% interest rates on loans pursuant to SUTA;
3. Availability of funds, including those funds available pursuant to the Section 306C grant set-aside for Native American Tribes or other applicable congressional set-asides; and
4. Percentage of the project that is located on SUTA eligible trust lands.

Eligibility Requirements

Eligibility requirements pursuant to 7 CFR 1780, such as credit elsewhere certifications (§1780.7(d)) and restrictions on the use of grant to reduce equivalent dwelling unit costs to a level less than similar systems cost (§1780.10 (b)(1)), will apply to applicants seeking a waiver of the loan component under SUTA.

Finding of Need and Feasibility through Underwriting

To ensure that limited grants funds are awarded to those projects with the greatest need, financial analysis and underwriting will continue to be used to determine the need for grant, including grant above the 75 percent level. The analysis will include the applicant's ability to incur debt at the prevailing program interest rate and the discretionary as low as 2 percent interest rates on loans pursuant to SUTA.

Availability of Funds

The commenter correctly noted that the Agency has limited grant funding available in the regular loan and grant program and a backlog of requests that exceeds \$3 billion. In addition, reductions in program funds will impact the ability of the Agency to provide needed grant funding. To support SUTA efforts to increase tribal participation in the program, the Agency will maximize the use of the Section 306C grant program, and other appropriate grant program set-asides to meet the grant needs of projects seeking waivers of the 75 percent grant limitation under SUTA. To ensure that grant funds are available to fund as many projects as possible, the agency may

limit the total amount of grant funding to be used to address requests for additional grants pursuant to SUTA, as well as total Agency grant investment in the project.

Percentage of Project on SUTA-defined Trust Lands

Grant determinations will factor in the percentage of the proposed project that is located on substantially underserved trust lands as defined under SUTA.

List of Subjects in 7 CFR Part 1700

Authority delegations (Government agencies) , Electric power, Freedom of information, Loan programs-communications, Loan programs-energy, Organization and functions (Government agencies), Rural areas, Telecommunications, Broadband loan and grant programs, water and waste loan and grant program, and the Distance Learning and Telemedicine program.

For reasons set out in the preamble, the agency amends chapter XVII of title 7 of the Code of Federal Regulations by amending part 1700 to read as follows:

PART 1700—GENERAL INFORMATION

1. The authority citation continues to read as follows:

Authority: 5 U.S.C. 301, 552; 7 U.S.C. 901 et seq., 1921 et seq., 6941 et seq.; 7 CFR 2.7, 2.17 and 2.47.

§§ 1700.59 through 1700.99 [Reserved]

2. Add reserved §§ 1700.59 through 1700.99 to Subpart C of part 1700.

3. Add subpart D, consisting of §§1700.100 to 1700.150, to read as follows:

Subpart D – Substantially Underserved Trust Areas

Sec.

1700.100 Purpose.

1700.101 Definitions.

1700.102 Eligible programs.

1700.103 Eligible communities.

1700.104 Financial feasibility.

1700.105 Determining whether land meets the statutory definition of “trust land.”

1700.106 Discretionary provisions.

1700.107 Considerations relevant to the exercise of SUTA discretionary provisions.

1700.108 Application requirements.

1700.109 RUS review.

1700.110 – 1700.149 [Reserved]

1700.150 OMB Control Number.

Subpart D – Substantially Underserved Trust Areas

§ 1700.100 Purpose.

This subpart establishes policies and procedures for the Rural Utilities Service (RUS) implementation of the Substantially Underserved Trust Areas (SUTA) initiative under section 306F of the Rural Electrification Act of 1936, as amended (7 U.S.C. 906f). The purpose of this rule is to identify and improve the availability of eligible programs in communities in substantially underserved trust areas.

§ 1700.101 Definitions.

Administrator means the Administrator of the Rural Utilities Service, or designee or successor.

Applicant means an entity that is eligible for an eligible program under that program's eligibility criteria.

Borrower means any organization that has an outstanding loan or loan guarantee made by RUS for a program purpose.

Completed application means an application that includes the elements specified by the rules for the applicable eligible program in form and substance satisfactory to RUS.

ConAct means the Consolidated Farm and Rural Development Act, as amended (7 USC 1921 et seq.).

Credit support means equity, cash requirements, letters of credit, and other financial commitments provided in support of a loan or loan guarantee.

Eligible community means a community as defined by 7 CFR 1700.103.

Eligible program means a program as defined by 7 CFR 1700.102.

Financial assistance means a grant, combination loan and grant, loan guarantee or loan.

Financial feasibility means the ability of a project or enterprise to meet operating expenses, financial performance metrics, such as debt service coverage requirements and return on investment, and the general ability to repay debt and sustain continued operations at least through the life of the RUS loan or loan guarantee.

Matching fund requirements means the applicant's financial or other required contribution to the project for approved purposes.

Nonduplication generally means a restriction on financing projects for services in a geographic area where reasonably adequate service already exists as defined by the applicable program.

Project means the activity for which financial assistance has been provided.

RE Act means the Rural Electrification Act of 1936, as amended (7 U.S.C. 901 et seq.).

RUS means the Rural Utilities Service, an agency of the United States Department of Agriculture, successor to the Rural Electrification Administration.

Substantially underserved trust area means a community in trust land with respect to which the Administrator determines has a high need for the benefits of an eligible program.

Trust land means “trust land” as defined in section 3765 of title 38, United States Code as determined by the Administrator under 7 CFR 1700.104.

Underserved means an area or community lacking an adequate level or quality of service in an eligible program, including areas of duplication of service provided by an existing provider where such provider has not provided or will not provide adequate level or quality of service.

§ 1700.102 Eligible programs.

SUTA does not apply to all RUS programs. SUTA only applies to eligible programs. An eligible program means a program administered by RUS and authorized in paragraph (a) of the RE Act, or paragraphs (b)(1), (2), (14), (22), or (24) of section 306(a) (7 U.S.C. 1926(a)(1), (2), (14), (22), (24)), or sections 306A, 306C, 306D, or 306E of the Con Act (7 U.S.C. 1926a, 1926c, 1926d, 1926e).

§ 1700.103 Eligible communities.

An eligible community is a community that:

- (a) Is located on Trust land;
- (b) May be served by an RUS administered program; and
- (c) Is determined by the Administrator as having a high need for benefits of an eligible program.

§ 1700.104 Financial feasibility.

Pursuant to normal underwriting practices, and such reasonable alternatives within the discretion of RUS that contribute to a financial feasibility determination for a particular eligible program or project, the Administrator will only make grants, loans and loan guarantees that RUS finds to be financially feasible and that provide eligible program benefits to substantially underserved trust areas. All income and assets available to and under the control of the Applicant will be considered as part of the Applicant's financial profile.

§ 1700.105 Determining whether land meets the statutory definition of “trust land.”

The Administrator will use one or more of the following resources in determining whether a particular community is located in Trust land:

- (a) Official maps of Federal Indian Reservations based on information compiled by the U. S. Department of the Interior, Bureau of Indian Affairs and made available to the public;

- (b) Title Status Reports issued by the U. S. Department of the Interior, Bureau of Indian Affairs showing that title to such land is held in trust or is subject to restrictions imposed by the United States;
- (c) Trust Asset and Accounting Management System data, maintained by the Department of the Interior, Bureau of Indian Affairs;
- (d) Official maps of the Department of Hawaiian Homelands of the State of Hawaii identifying land that has been given the status of Hawaiian home lands under the provisions of section 204 of the Hawaiian Homes Commission Act, 1920;
- (e) Official records of the U.S. Department of the Interior, the State of Alaska, or such other documentation of ownership as the Administrator may determine to be satisfactory, showing that title is owned by a Regional Corporation or a Village Corporation as such terms are defined in the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq);
- (f) Evidence that the land is located on Guam, American Samoa or the Commonwealth of the Northern Mariana Islands, and is eligible for use in the Veteran's Administration direct loan program for veterans purchasing or constructing homes on communally-owned land; and
- (g) Any other evidence satisfactory to the Administrator to establish that the land is "trust land" within the meaning of 38 U.S.C. 3765(1).

§ 1700.106 Discretionary provisions.

- (a) To improve the availability of eligible programs in eligible communities determined to have a high need for the benefits of an eligible program, the Administrator retains the discretion, on a

case-by-case basis, to use any of the following SUTA authorities individually or in combination to:

(1) Make available to qualified applicants financing with an interest rate as low as 2 percent;

(2) Extend repayment terms;

(3) Waive (individually or in combination) non-duplication restrictions, matching fund requirements, and credit support requirements from any loan or grant program administered by RUS; and

(4) Give the highest funding priority to designated projects in substantially underserved trust areas.

(b) Requests for waivers of nonduplication restrictions, matching fund requirements, and credit support requirements, and requests for highest funding priority will be reviewed on a case-by-case basis upon written request of the applicant filed pursuant to 7 CFR 1700.108.

(c) Notwithstanding the requirements in paragraph (b) of this section, the Administrator reserves the right to evaluate any application for an eligible program for use of the discretionary provisions of this subpart without a formal, written request from the applicant.

§ 1700.107 Considerations relevant to the exercise of SUTA discretionary provisions.

(a) In considering requests to make available financing with an interest rate as low as 2 percent, and extended repayment terms, the Administrator will evaluate the effect of and need for such terms on the finding of financial feasibility.

(b) In considering a request for a non-duplication waiver, the Administrator will consider the offerings of all existing service providers to determine whether or not granting the non-duplication waiver is warranted. A waiver of non-duplication restrictions will not be given if the Administrator determines as a matter of financial feasibility that, taking into account all existing service providers, an applicant or RUS borrower would not be able to repay a loan or successfully implement a grant agreement. Requests for waivers of non-duplication restrictions will be reviewed by taking the following factors into consideration:

- (1) The size, extent and demographics of the duplicative area;
- (2) The cost of service from existing service providers;
- (3) The quality of available service; and
- (4) The ability of the existing service provider to serve the eligible service area.

(c) Requests for waivers of matching fund requirements will be evaluated by taking the following factors into consideration:

- (1) Whether waivers or reductions in matching or equity requirements would make an otherwise financially infeasible project financially feasible;
- (2) Whether permitting a matching requirement to be met with sources not otherwise permitted in an affected program due to regulatory prohibition may be allowed under a separate statutory authority; and

(3) Whether the application could be ranked and scored as if the matching requirements were fully met.

(d) Requests for waivers of credit support requirements will be evaluated taking the following factors into consideration:

(1) The cost and availability of credit support relative to the loan security derived from such support;

(2) The extent to which the requirement is shown to be a barrier to the applicant's participation in the program; and

(3) The alternatives to waiving the requirements.

(e) The Administrator may adapt the manner of assigning highest funding priority to align with the selection methods used for particular programs or funding opportunities.

(1) Eligible programs which use priority point scoring may, in a notice of funds availability or similar notice, assign extra points for SUTA eligible applicants as a means to exercise a discretionary authority under this subpart.

(2) The Administrator may announce a competitive grant opportunity focused exclusively or primarily on trust lands which incorporates one or more discretionary authorities under this subpart into the rules or scoring for the competition.

§ 1700.108 Application requirements.

(a) To receive consideration under this subpart, the applicant must submit to RUS a completed application that includes all of the information required for an application in accordance with the regulations relating to the program for which financial assistance is being sought. In addition, the applicant must notify the RUS contact for the applicable program in writing that it seeks consideration under this subpart and identify the discretionary authorities of this subpart it seeks to have applied to its application. The required written request memorandum or letter must include the following items:

(1) A description of the applicant, documenting eligibility.

(2) A description of the community to be served, documenting eligibility in accordance with 7 CFR 1700.103.

(3) An explanation and documentation of the high need for the benefits of the eligible program, which may include:

(i) Data documenting a lack of service (i.e. no service or unserved areas) or inadequate service in the affected community;

(ii) Data documenting significant health risks due to the fact that a significant proportion of the community's residents do not have access to, or are not served by, adequate, affordable service.

(iii) Data documenting economic need in the community, which may include:

(A) Per capita income of the residents in the community, as documented by the U.S. Department of Commerce, Bureau of Economic Analysis;

(B) Local area unemployment and not-employed statistics in the community, as documented by the U.S. Department of Labor, Bureau of Labor Statistics and/or the U.S. Department of the Interior, Bureau of Indian Affairs;

(C) Supplemental Nutrition Assistance Program participation and benefit levels in the community, as documented by the U.S. Department of Agriculture, Economic Research Service;

(D) National School Lunch Program participation and benefit levels in the community, as documented by the U.S. Department of Agriculture, Food and Nutrition Service;

(E) Temporary Assistance for Needy Families Program participation and benefit levels in the community, as documented by the U.S. Department of Health and Human Services, Administration for Children and Families;

(F) Lifeline Assistance and Link-Up America Program participation and benefit levels in the community, as documented by the Federal Communications Commission and the Universal Service Administrative Company;

(G) Examples of economic opportunities which have been or may be lost without improved service.

(H) Data maintained and supplied by Indian tribes or other tribal or jurisdictional entities on “trust land” to the Department of Interior, the Department of Health and Human Services and the Department of Housing and Urban Development that illustrates a high need for the benefits of an eligible program.

(4) The impact of the specific authorities sought under this subpart.

- (b) The applicant must provide any additional information RUS may consider relevant to the application which is necessary to adequately evaluate the application under this subpart.
- (c) RUS may also request modifications or changes, including changes in the amount of funds requested, in any proposal described in an application submitted under this subpart.
- (d) The applicant must submit a completed application within the application window and guidelines for an eligible program.

§ 1700.109 RUS review.

- (a) RUS will review the application to determine whether the applicant is eligible to receive consideration under this subpart and whether the application is timely, complete, and responsive to the requirements set forth in 7 CFR 1700.107.
- (b) If the Administrator determines that the application is eligible to receive consideration under this subpart and one or more SUTA requests are granted, the applicant will be so notified.
- (c) If RUS determines that the application is not eligible to receive further consideration under this subpart, RUS will so notify the applicant. The applicant may withdraw its application or request that RUS treat its application as an ordinary application for review, feasibility analysis and service area verification by RUS consistent with the regulations and guidelines normally applicable to the relevant program.

§§ 1700.110 – 1700.149 [Reserved]

§ 1700.150 OMB Control Number.

The reporting and recordkeeping requirements contained in this part have been approved by the Office of Management and Budget and have been assigned OMB control number 0572-0147.

Dated: May 23, 2012

Jonathan Adelstein
Administrator
Rural Utilities Service

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